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# Asbestos: The Private Management of a Public Problem

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# THE THIRTIETH CLEVELAND-MARSHALL FUND LECTURE

## ASBESTOS: THE PRIVATE MANAGEMENT OF A PUBLIC PROBLEM\*

HARRY H. WELLINGTON\*\*

In October 1982, I was selected as the neutral moderator of a group consisting of major asbestos producers, large insurance companies, and prominent personal injury lawyers who are suing the asbestos producers, and indirectly their insurers, alleging that thousands of their clients contracted serious diseases by inhaling asbestos fibers. The aim of this tripartite group (which, for reasons that have little to do with my contribution, became known as the Wellington Group) has been to design a private administrative agency that will fairly and effectively manage the bulk of asbestos claims and asbestos product liability litigation.

Under the existing judicial system in America, asbestos litigation has reached epidemic proportions. It is extravagantly expensive and grotesquely inefficient. Conceivably billions of dollars are at stake in this group effort and the fair treatment of thousands of very sick people and thousands more who one day will be ill as a result of asbestos may turn on the success of this private initiative.

### I. THE NATURE AND MAGNITUDE OF THE ASBESTOS PROBLEM

#### A. *The Product and the Diseases*

Asbestos is a mineral compound of great utility. It is strong and flexible, as well as fire and heat resistant. It is used in all types of constructions. It is mixed with cement, tile, and paint. It is found in brake linings and is wrapped around heating pipes to keep water warm. It is used for siding, roofs, and ceiling insulation.

Yet if you work with asbestos, or come in contact with it in one way or another, you easily could get some fibers into your lungs. If that happens often enough, it is very dangerous indeed. For it is well documented that

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\* This paper was delivered, in a slightly different form, as the Thirtieth Cleveland-Marshall Fund Lecture. While I have added a few footnotes, I have not attempted to convert that lecture into something it was not meant to be: a full-blown and documented research paper on the legal aspects of the asbestos problem.

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asbestos causes two types of deadly cancer—mesothelioma and bronchogenic carcinoma—as well as asbestosis, a serious lung disease that renders breathing difficult, and is sometimes lethal.<sup>1</sup>

All of these diseases have long latency periods; it takes 15 to 40 years after exposure to asbestos for an illness to manifest itself. This is important for various reasons; as we shall see, it makes litigation complex and it suggests that the problem will remain well into the twenty-first century. Recent epidemiological studies disagree. Collectively, however, they forecast that over the next thirty years, asbestos will account for approximately 74,000 to 265,000 deaths.<sup>2</sup>

### *B. The Nature of the Underlying Tort Litigation*

Individuals or entities who believe they have been harmed by asbestos often sue the corporations that produced the asbestos and the products that incorporated or used the substance in some way. Often it is impossible to know with particularity who is responsible. How can a plaintiff identify the manufacturer of products used years ago? In such situations, a plaintiff will sue all relevant asbestos producers (the average number of defendants is roughly twenty)<sup>3</sup> with the goal of holding them jointly and severally liable. This strategy has worked.

Some suits seek property damages: removing asbestos insulation from schools is a principal example. The bulk of the cases, including those I am most concerned with, are those involving bodily injury; the alleged injury is either asbestosis or cancer, and the action is typically a strict products liability suit, sounding in tort. In addition to exposure, injury, and product identification, the burden is on plaintiff to demonstrate that the defendants knew, or should have known, that asbestos exposure created a health-risk, and that this in turn created an unmet obligation to warn the plaintiff.

The leading case sustaining this cause of action was decided in 1973.<sup>4</sup> Today it is estimated that there are more than 24,000 asbestos product liability claims pending in American courts.<sup>5</sup> There is every reason to believe that this number will continue to increase and remain high over the next thirty years unless some alternative to the present system is adopted.

### *C. Compensation, Expenses and Projection*

A study, recently completed by the Rand Corporation, reports that

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<sup>1</sup> A standard medical work is I. SELIKOFF & D. LEE, *ASBESTOS AND DISEASE* (1978).

<sup>2</sup> J. KAKALIK, P. EBENER, W. FELSTINER, M. SHANLEY, *COSTS OF ASBESTOS LITIGATION 3* (Rand Institute of Civil Justice, 1983)(hereinafter cited as *RAND REPORT*).

<sup>3</sup> *Id.*

<sup>4</sup> *Borel v. Fiberboard Paper Prod.*, 493 F.2d 1076 (5th Cir. 1973).

<sup>5</sup> *RAND REPORT* at 3.

from "the early 1970s through the end of 1982, approximately 400 million dollars has been paid by defendants and their insurers in *total compensation* for asbestos-related injury."<sup>6</sup> Eighty-four percent of this occurred after January 1980. This figure includes settlements and trial awards in personal injury products liability actions. It "*excludes* all defense legal expenses and related costs."<sup>7</sup> Moreover, it tells us nothing about how much of this 400 million dollars received by plaintiffs was transferred to plaintiffs' lawyers for legal expenses and related costs.

Another study completed in 1983 estimates that within the next thirty years this 400 million dollar figure will grow from anywhere between 7.6 and 87.1 billion dollars.<sup>8</sup>

The Rand study also reports that the "average total compensation per claim paid by all defendants and their insurers was approximately \$60,000 and total defense litigation expenses were \$35,000 (fifty percent of total compensation)."<sup>9</sup> If we apply the Rand figure for defense to estimates of total compensation over the next thirty years, we find that, under the existing system, defense costs will be in the billions.

Compensation and defense figures of this magnitude are part of the justification proffered by Manville, the largest asbestos producer, and two other companies for seeking reorganization under Chapter 11 of the Bankruptcy Act. Manville's approach to the asbestos litigation problem has caused considerable disruption among all participants in the industry, as well as insurers and plaintiffs. Indeed, Manville's bankruptcy may well have been one of the reasons for the establishment of the group I have been moderating.

#### *D. Some Explanation of Defense Costs*

The ratio of defense costs to compensation awards in asbestos litigation is substantially higher than in most other tort cases.<sup>10</sup> One reason may be the importance and extensive use of discovery in preparation for trial. It may be important for the parties to know who knew what fifteen to forty years ago. The principal reason, however, appears to be the number of defendants named in each suit. As mentioned earlier, due to the long latency period of asbestos-related diseases, it is generally impossible to know with particularity who is responsible. A plaintiff, accordingly, will sue all relevant asbestos producers intending to hold each jointly and severally liable. Often each defendant (and its several insurers, or both) has its own defense team.

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<sup>6</sup> RAND REPORT at 17. (Italics in original).

<sup>7</sup> *Id.*

<sup>8</sup> P. MACAVOY, J. KARR & P. WILSON, THE ECONOMIC CONSEQUENCES OF ASBESTOS RELATED DISEASE 4-45 (unpublished, 1983).

<sup>9</sup> RAND REPORT at viii.

<sup>10</sup> *Id.* at 26-27.

This duplication, with its resulting multiplicity of lawyers, is expensive and wasteful. Many efforts—some more successful than others—to achieve coordinated defenses have been attempted.<sup>11</sup> But under the existing system there is bound to be profound conflicts of interest and more than a little lack of trust among the defendants, their insurance carriers, and between the two groups. A truly coordinated defense requires a prior, and perhaps general agreement on defendant's liability. Only by such agreements can there be responsible allocations of liability among producers, or harmony between defendants and their insurers. Among other things, the group I moderate is in quest of this goal.

### *E. Contingency Fees*

Even as the relationship between compensation and defense costs is alarmingly high in asbestos litigation, so too is the ratio of recovery to the fees paid lawyers representing plaintiffs. Generally, lawyers handle cases on a contingency fee basis. While this may help to explain high fees, it means that the meritorious—or at least victorious—plaintiffs subsidize those who lose. At any rate, the Rand study found that of the total compensation paid to plaintiffs from early 1970s to the end of 1982, “[forty-one] percent was used by plaintiffs for litigation expenses.”<sup>12</sup>

The Rand study concludes that due to the exorbitant costs of asbestos litigation, each dollar to injured plaintiffs is paid for at a cost of two dollars and seventy-one cents to defendants.<sup>13</sup> This is simply unacceptable. For if this trend were to continue it is virtually certain there will *not* be enough defense money to compensate for the victims of asbestos diseases, nor enough insurance to maintain the survival of many asbestos defendants. These defendants are large corporations that provide employment to workers in communities all over the United States and the loss of these corporations would have negative ramifications throughout the American economy.

I hope this background will help explain the purpose and dynamics of the Wellington group.

## II. THE SEARCH FOR A SOLUTION: C.P.R. AND THE WELLINGTON GROUP

In the early fall of 1982, shortly after the Manville corporation sought reorganization, I was selected to moderate a tripartite effort aimed at reducing transaction costs and promoting the fair settlement of asbestos related claims. The group that selected me, with the help of the Center

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<sup>11</sup> Procedural reforms for asbestos litigation have also been recommended. See *e.g.*, FINAL REPORT WITH RECOMMENDATIONS (JUDICIAL ADMINISTRATION WORKING GROUPS ON ASBESTOS LITIGATION, NATIONAL CENTER FOR STATE COURTS (1984)).

<sup>12</sup> RAND REPORT at 38.

<sup>13</sup> *Id.* at 38-39.

for Public Resources (a private non-profit organization dedicated to the reduction of conflict and the promotion of alternative and less expensive methods of dispute resolution) consisted of insurers, producer, and plaintiffs' attorneys. Along with my Yale colleague, Edward Dauer, and James Henry, the president of C.P.R., the parties involved spent several days over several weeks getting to know each other in order to establish that minimum of trust necessary to work together on the problem. My approach was to ask each group of participants to educate the moderator or facilitator, as I was generally called, about the asbestos litigation industry, each from its own perspective.

There can be no question that initially it was necessary to get the group talking. Apart from the plaintiff's lawyers (whose internal disagreement seemed to have more to do with personal conflicts than with substantive issues), communication was vital for holding the producers and insurers together as separate groups. For in the Fall of 1982, there were numerous conflicts and disagreements within each industry as well as between them.

#### *A. Conflict Among the Producers*

In the first place, the producers that were the defendants in the underlying tort litigation, were sharply split between the three of them, including Manville, that sought reorganization in bankruptcy as the solution to their asbestos liability while the rest were committed to alternative methods of resolving their difficulties.

Second, all the producers had a stake, and potentially conflicting positions, on the method of calculating their liability share. For that share would determine the percentage of every settlement each producer or its insurer would pay.

Third, each producer's attitudes and priorities were influenced importantly by the amount of insurance it had purchased over the years and the amount of coverage that insurance afforded. Insurance money available for indemnification and defense varied substantially among producers. If a company had sufficient coverage in the short run—particularly if it had the assurance of a judgment in its favor and against its insurers—but had no insurance ten years down the line, its approach to a solution and its priorities were bound to differ from the producer who had fair coverage now and for the foreseeable future.

Finally—and this is really a different sort of point—the producers had nothing in common except asbestos litigation. They were not in an industry whose members had a history of cooperation.

#### *B. Conflicts Among the Insurers*

Two factors were principally responsible for the different perspectives and lack of cohesiveness among the insurers. The first is the structure of the industry. Under the standard policy, the primary carrier (which

writes the initial coverage) not only has a duty to indemnify its policyholder, but also to provide defense. Yet, such defense does not deplete liability limits. Excess carriers—and some primaries write excess insurance—provide coverage above the primary layer. Normally, excess policies either do not have a defense obligation or, if they do, defense costs reduce indemnity limits. Finally, there are reinsurers who have no contractual relations with policyholders. Their contracts or treaties are with primary or excess insurance companies that lay-off through reinsurance the risk they have assumed.

Clearly, the interests of the various types of insurers differ. For example, due to high defense costs in asbestos litigation, some primary insurers may have an interest in exhausting their indemnity limits quickly where the defense obligation is tied to indemnity. This is not in the interest of the excess carrier, for it means that the excess carrier must start paying sooner. Moreover, if the excess carrier has no defense obligation, it is bound to be less concerned about litigation costs than the primary carrier.

The second factor that caused conflict in the insurance industry was the differing positions that the various companies took regarding when an insurance policy had to respond in order to indemnify an asbestos defendant. Was it at the time that the plaintiff was exposed to asbestos; was it many years later when the illness manifested itself or some other time? There were substantial disagreements and hard feelings within the industry over these questions.

But the insurance industry is an industry whose members do business together and have a continuing relationship with each other. The companies are bound together by a host of problems other than asbestos. This, I believe, proved to be very important to our group and the success it has been able to achieve. Nevertheless, one might have hoped for more cooperation from the insurance industry.

### *C. Conflicts Between Producers and Insurers*

The insurance coverage questions, along with some other insurance questions, badly separated the insurers from the producers. Disagreement led to major litigation, charges of bad faith, and claims for punitive damages. The insurers and the producers did not trust each other. Each saw the other as an enemy.

Because these insurance questions did not directly involve the plaintiffs' lawyers, it became clear to all in the group I was moderating that the producers and the insurers would have to meet without the plaintiffs to try and work out their profound disagreements about insurance coverage. Until the single question of "who pays for what?" could be answered, there could be no true solution to the underlying tort litigation, neither could an independent, fully-funded Asbestos Claims Facility be created as an alternative expensive litigation.

As might be suspected, the answer reached to this question, after months of bargaining, was heavily influenced by the judicial decisions applying insurance policies, decisions rendered before and during deliberations. I shall try to give a brief overview of some of this evolving background law.

#### *D. The Insurance Coverage Cases*

In a formal or doctrinal sense much of the background involves the interpretation of comprehensive general liability policies issued by carriers to asbestos producers. Typically, these policies, written in the late 1960s and early 1970s, provided that the insurance "company will pay on behalf of the insured . . . damages because of bodily injury . . . to which this insurance applies, caused by an occurrence." Bodily injury was defined to mean: "bodily injury, sickness, or disease," and occurrence was defined as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury."<sup>14</sup> Such language would not present serious problems of interpretation if exposure to asbestos and manifestation of an asbestos-related disease both took place within the same policy year; the definitions of occurrence and bodily injury would be satisfied. But exposure may be 15 to 40 years prior to manifestation, although the disease may have begun at the time of exposure. The development of asbestos-related diseases is just not clear. As one court has said: "[I]t is not known how little exposure is required to cause disease [and] inhalation may occur over a long period of time. As a result, inhalation may continue through numerous policy periods, the disease may develop during subsequent policy periods, and manifestation may occur in yet another policy period."<sup>15</sup> Accordingly, it is surely linguistically possible, given the policy's definitions, to say that exposure either is or is not an "occurrence" and that the beginning of the disease, absent any functional impairment, either does or does not constitute a "bodily injury."

The insurance companies disagreed among themselves as to the meaning of this policy language and they did so in the most public of ways—in coverage litigation with policyholders. Some insurers insisted that coverage was triggered only when an asbestos-related disease manifested itself. This position means that all policies issued during the latency period provide no coverage. Other insurers insisted that coverage was triggered only by exposure, that is, by the inhalation of asbestos fibers. This approach means that all policies issued subsequent to exposure provide no coverage. It is therefore significant to recall that it may be many years after exposure ends before a disease manifests itself.

Given the public disagreement among insurance companies on the

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<sup>14</sup> See *Keene Corp. v. Insurance Co. of N. Am.*; 667 F.2d 1034, 1054 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

<sup>15</sup> *Id.* at 1040.



meaning of their policies, one need not have been clairvoyant to have predicted the future: some courts adopted manifestations as the trigger of coverage,<sup>16</sup> some exposure;<sup>17</sup> and some divided exposure into inhalation exposure (breathing asbestos fibers) and exposure in residence (the period fibers are in the lungs before the disease becomes manifest). The latter courts made either type of exposure a trigger of coverage and added manifestation itself as an additional trigger. This is the so-called triple-trigger approach.<sup>18</sup>

All the courts looked at identical insurance policy language. All undertook to rest their decisions on the interpretation of that language. But there can be little doubt that each court was powerfully influenced by what all courts took to be a general proposition of insurance law: "resolve doubts," in this case, doubts highlighted by the inconsistent theories of insurance lawyers, "in favor of maximizing coverage."<sup>19</sup> The manifestation courts, and the exposure courts, came out differently because the application of this general proposition to particular facts dictated different results. The triple trigger courts were merely more imaginative in giving the general approach its fullest application.

The principal triple-trigger case is *Keene v. INA*,<sup>20</sup> decided by the United States Court of Appeals for the District of Columbia Circuit. That case held that once coverage is triggered, an insurer is liable in full, but "that only one policy's limits can apply to each injury,"<sup>21</sup> and that the insured "may select the policy under which it is to be indemnified."<sup>22</sup> The court stated: "In any suit against [a defendant] for an asbestos-related disease, it is likely that the coverage of more than one insurer will be triggered. Because each insurer is fully liable, and because [a defendant] cannot collect more than it owes in damages, the issue of dividing insurance obligation arises. The only logical resolution of this issue is for [a defendant] to be able to collect from any insurer whose coverage is triggered, the full amount of indemnity that it is due, subject only to the provisions in the policies that govern the allocation of liability when more than one policy covers an injury."<sup>23</sup>

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<sup>16</sup> See, e.g., *Eagle-Picher Indus. v. Liberty Mut. Ins. Co.*, 523 F. Supp. 110 (D. Mass. 1981), *aff'd in part*, 682 F.2d 12 (1st Cir. 1982), *cert. denied*, 103 S. Ct. 1280 (1983).

<sup>17</sup> See, e.g., *Insurance Co. of N. Am. v. Forty-Eight Insulations*, 633 F.2d 1212 (6th Cir. 1980), *clarified*, 657 F.2d 814 (6th Cir.), *cert. denied*, 454 U.S. 1109 (1981).

<sup>18</sup> *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

<sup>19</sup> *Insurance Co. of N. Am. v. Forty-Eight Insulations*, 633 F.2d 1212, 1222 (6th Cir. 1980), *clarified*, 657 F.2d 814 (6th Cir.), *cert. denied*, 454 U.S. 1109 (1981).

<sup>20</sup> See *supra* note 18.

<sup>21</sup> *Id.* at 1049.

<sup>22</sup> *Id.* at 1049-50.

<sup>23</sup> *Id.* at 1050.

*E. The Implications of the Coverage Cases to the Wellington Group*

The direction that coverage litigation seemed to be taking and the rationale that shaped the judicial decisions, significantly influenced negotiations in our group. It seemed quite clear to me that the producers could not accept a universal coverage resolution unless it gave them a generous interpretation—perhaps one as generous as *Keene*—to the insurance law proposition that one resolves doubts in favor of maximizing coverage. Moreover, the fact that insurance companies did business with each other on a continuing basis, and thus were better situated than the producers to make internal accommodations on a variety of other issues, led me to believe that such an agreement might be achieved.

Of course, something had to be given in exchange. The quid pro quo turned out to be an agreement by the producers to dismiss their actions against the insurers, actions that often alleged bad faith and claimed extensive punitive damages. A conditional coverage agreement was reached after months of extremely difficult negotiations. It recognized that sometime after *Borel v. Fibreboard Paper Prod.*<sup>24</sup>, the 1973 product liability decision, insurance policies were protectively written, often with high deductibles, in order to limit insurers' asbestos liability. The carriers agreed that the producers could, if they wished, exhaust their earlier coverage before using this less desirable insurance. Under the agreement, each producer could unilaterally draw a line sometime between 1973 and 1979. That line would then define a coverage block that could be enlarged for, over time, more protectively written policies may be added by the producer.

Briefly, a claim triggers all insurance policies within the block from the time of first exposure to the time of diagnosis or death, whichever occurs first. Each policy that is triggered will respond to a claim in a pro-rata fashion and, when primary insurance for a particular year is exhausted, excess insurance for that year will drop down for indemnity purposes. Moreover, when coverage in any year is exhausted, insurance from other years within the block will, in most cases, fill the gap. But the total limits of each insurance policy, of course, will not thereby be increased. While this approach is quite different from *Keene*, it seems clear that for most producers it is as favorable an outcome.

The coverage agreement was conditioned on the resolution of many other problems. This has now been accomplished in one way or another. A few issues need mention in order to convey a sense of the complicated nature of the matters before the group.

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<sup>24</sup> *Borel v. Fiberboard Paper Prod.*, 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974).

*F. Some Additional Insurance Problems*

(A) One problem, similar to the coverage issues I have discussed, is the trigger of liability in property damage cases. Many schools in the United States have insulation made of asbestos which is beginning to flake. School boards are having the asbestos removed to ensure the health of children. It is expensive to remove asbestos and to cover the cost, the school boards are suing producers on a theory of product liability. The producers want indemnification and defense from their insurers, and there is disagreement as to when a policy is triggered for these purposes. Needless to say, the producers are pressing for the property damage analogue of *Keene*, while the insurers wish to limit the trigger of coverage. To date, there is little background law and our group has not been able to reach an agreement. Everyone therefore agreed to establish and fund an asbestos claims facility for bodily injury cases before attempting further to resolve the property damage coverage question.

(B) Almost as significant as indemnity coverage in personal injury cases is the duty to defend. As I have mentioned, primary insurers have an obligation to defend their policyholders as well as to indemnify them. No one doubts that the defense obligation exists as long as indemnity limits have not been exhausted. Producers claim, however, with some strong judicial support,<sup>25</sup> that insurance policies written on forms developed before October 1966 provide a defense obligation that survives the exhaustion of indemnity limits. Vast sums of money may turn on this contention. Primary coverage for some producers is virtually exhausted already, and excess layers of insurance either do not provide defense or do so only by depleting indemnity limits.

Of course, if our Asbestos Claims Facility works, that is, if it is capable of settling claims fairly inexpensively, and with less litigation, defense costs will be sharply reduced and the legal questions will be less important. But neither the producers nor the insurers were prepared to assume unilaterally that risk over this question. Accordingly, for several months, while the parties struggled to find a compromise, prospects for a successful conclusion of our entire undertaking seemed bleak. It was indeed a grim period.

Finally the elusive compromise took shape: the producers recognized that the defense obligation ended when indemnity was exhausted. But it was agreed that the facility to be established would itself provide a supplementary defense program for pre-1966 policies. Since, under the resolution of the coverage issue the facility would be paid for almost entirely

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<sup>25</sup> *AC and S, Inc. v. Aetna Casualty & Surety Co.*, 576 F. Supp. 936, 942 (E.D. Pa.), *appeals docketed*, Nos. 83-1927, 1928 (3d Cir. 1983); *Commercial Union Insur. Co. v. Pittsburgh Corning Corp.*, 553 F. Supp. 425, 429 (E.D. Pa. 1981); *Zurich Insur. Co. v. Raymark Indus. Inc.*, No. 78L8760 at 6 (Ill. Cir. Ct. Cooks Cty, June 15, 1982). *Contra*, *Keene Corp. v. Insurance Co. of N. Am.*, No. 78-1011 (D.D.C. Nov. 19, 1984).

by the insurers, the facility's defense program would have to be financed by premiums paid by insurance companies. In a sense, therefore, the compromise was an insurance type of solution to a difficult insurance problem.

(C) Throughout the discussions in our group, and in many separate meetings with participants from insurance companies, I was told of a sharp distinction that had to be drawn: one between insurance policies written before the industry understood the asbestos problem and those written thereafter. The latter, I was told, were written defensively and took account of asbestos product liability case law. The insurers took the position that policies should be interpreted with this distinction clearly in mind. I should add, however, that this point was not made with respect to coverage triggers, presumably because the language relevant to that issue had not been changed.

While the producers were much less clear about this distinction, they did not resist it too strongly. No one was confident about the appropriate date for the distinction. As we have seen, the producers were allowed unilaterally to set the date with respect to establishing an initial coverage block. With respect to other matters, however, it was finally decided that each producer and its insurers would reach their own agreements on which policies were pre-date and which were post-date.

Much turns on this distinction between pre- and post-date policies with respect to, for example, how the parties will handle deductibles that are not limited explicitly by insurance policy language. To greatly simplify, pre-date policies with low deductibles are to be capped at agreed-upon multipliers; post-date policies are to apply as written. The same general approach is to be used for insurance policies written without aggregate limits.

Much more could be said about the insurance issues that engaged the attention of the insurers and producers in our group. But, I believe that I have said enough to convey a sense of the complexity of the problems we faced. And remember that the amount of money at stake in our negotiations is in the billions of dollars. Tough problems and high stakes generally lead to hard bargaining: It certainly did for us.

### III. THE PROCESS OF DESIGNING AND THE DESIGN OF AN ASBESTOS CLAIMS FACILITY

I now want to talk a little more about the bargaining as a process. Then, I would like to look at the structure or design of the private administrative agency that the group hopes to have in operation sometime in 1985.

#### A. *The Process*

In my description of the insurance problems, I talked some about process. I emphasized the nature of the insurance industry and of the pro-

ducers' group, and related this to the negotiations. I also stressed the central function played by law and the development of trust that evolved through discussion. Let me now pick up on this latter point.

Perhaps the most significant contribution that I, and the other neutrals who worked with me, made to the success of our group was to keep the process going. Over and over again the parties reached an impasse. They reached it in ways that would have made it extremely difficult for them to get back together if there had not been a third party present, someone who could explain, help save face, and especially, take the blame. Moreover, as moderator I was able to reduce tension and avoid impasse by changing the subject or terminating a session. The odd story, joke, or quote—sometimes made up—was a good tool in the early days when the parties saw each other as enemies.

In those early days little substantive progress was made; there was too much friction. Yet, the time was well spent, for it was necessary for the parties to let off steam and for all of us to feel our way toward an approach that would help the parties learn to trust each other and, indeed, the neutrals. Progress depended on everyone's belief in the others' good faith. Each participant had to prove that he wanted the enterprise to succeed, that he was willing to give up something important to make it succeed, and that he was not using our group merely as a way of advancing his own or his company's special interest.

One approach that helped a great deal involved reducing the size of the negotiating teams. Each team reported to its parent group and took instruction. Over time, however, power and responsibility became vested in the negotiating teams. Through the exercise of that power *with* responsibility, a shift occurred: the parties began to trust each other and substantive progress took place. I believe that my team and I helped establish this essential precondition to success.

We were, as well, able to make some substantive suggestions that proved helpful. Generally, this took place in talks with one side or the other. Often, however, our ideas were rejected. I think we were probably most influential with the insurers on the substantive issue of insurance coverage. We were able, in a disinterested fashion, to evaluate the judicial decisions, and to make it clear that given the evolving law the producers would not move—indeed they really could not move—to any arrangement that was less favorable for them than *Keene*.

In the first eight months or so of our group process, the insurers were more open with me and my associates than were the producers. I attribute this to the fact that the insurers frequently did business together and trusted each other enough to talk in front of us. It took longer for the producers to reach this point because they had had less experience dealing with each other and did not trust each other enough to be candid with us, or to let us participate in their internal group debates. When this changed, we began to make more and faster progress. I am not sure, however, whether there is a causal relationship, and if there is, how the causa-

tion runs.

I should mention another important factor in our success: that is the failure or at least the lack of success of other efforts. There were several. Our ability to keep the talks going, even when we were making no progress, gave us considerable credibility. Moreover, because most of our meetings excluded plaintiffs' lawyers, my associate and I played a role in keeping them informed and interested. The plaintiffs' commitment to our effort added importantly to its credibility and gave it an external validation that helped keep us going.

Time will not permit me to explore this area further. It is an article itself. There is much to be said about how pending litigation, including the Manville reorganization proceedings, influenced the course of our progress; how concern with other toxic torts affected attitudes toward asbestos insurance problems; how important confidentiality has been and why; what role various personalities played in the process; how power struggles within companies influenced progress; how carrier and producer insurance lawyers, trained in a particular type of drafting, addressed the constitutional-type problem faced by our group; and much, much more.

But after all is said that can be said about process, it probably in the end is the case that our group reached agreement because the alternative, the present formal justice system, is too costly and was seen by almost everyone as no more than a second best way of dealing with the asbestos problem.

Well, then, in what stage of this continuing drama do we now find the Group, and what does its design for the asbestos litigation industry look like?

### *B. The Design*

We now have a final agreement. The details of that agreement are public, and educational sessions have been held to persuade the insurance companies and the asbestos producers that have not been members of our group to accept our work and formally subscribe to our plan.

Our plan calls for the establishment of an independent nonprofit organization to be known as the Asbestos Claims Facility. The Facility will administer and arrange for the evaluation, settlement, or defense of all asbestos-related claims against its members. Its members will be insurers and producers who subscribe to the agreement that was so desperately negotiated for some twenty months. That agreement, of course, includes the resolution of such matters as the insurance coverage issues and the duty to defend. These are matters that establish the method of funding the new Facility. The evaluation, settlement, or defense of claims will be paid for by the insurance, provided there is any, that each subscribing producer, with its subscribing insurers, bring to the Facility. Assuming that insurance has been purchased, how much is brought to the Facility at the time of subscription depends on the coverage and other aspects of

the agreement that the parties to our group have negotiated.

How the cost to the Facility of processing and finally closing a claim is allocated to subscribers is an important matter that I have not yet discussed. Very briefly, the producers in our group, with the help of a consultant, over a sixteen month period, developed a formula based on data relating to their past litigation experience. The formula allocates a liability share to every subscribing producer for all claims brought to the Facility. This means that when a claim is settled, a percentage of the cost of the settlement will automatically be charged to each subscriber.

The complicated nature of the problems addressed in our group made it clear to all that disagreements among subscribers might occur over the meaning of the agreement or its application in particular situations. Accordingly, Alternative Dispute Resolution (ADR) procedures have been designed to resolve potential disagreements.

Moreover, during the months of discussion it became apparent that some issues could not be resolved, and that the best we could do was to fashion a procedure for a subsequent resolution. An example is the exclusion from coverage of "asbestosis" written into some general liability policies. Given the understandings when those policies were written, should the exclusion apply only to the disease we call asbestosis, or should it apply to all asbestos-related disease? Over one half billion dollars could turn on the answer to that question.

Often, but not always, questions of this sort were special problems for particular members of the group. The procedures adopted for their ultimate resolution took two forms: either good faith negotiation, followed if necessary by binding private settlement through some form of ADR, such as arbitration; or, negotiation, then non-binding ADR, followed, if required by formal litigation. Litigation, as a last resort, was believed necessary in some cases involving hundreds of millions of dollars, in order to satisfy either corporate shareholders or reinsurers. An example is large deductibles without limits (over \$25,000) in old or pre-date policies.<sup>26</sup>

When the Facility is established later this year, it is anticipated that the lawyers of individuals, allegedly injured by asbestos, will bring their cases to the offices of the Facility for investigation and settlement. Proposed settlements that are not acceptable will go through an Alternative Dispute Resolution procedure that is being developed in consultation with the plaintiffs' lawyers. It is everyone's hope that ADR will be the final step in all but a handful of cases which will go on to litigation in the civil courts. The Facility will defend where such litigation is pressed, using one team of lawyers, not twenty or more.

At every stage, from claims handling, through ADR to litigation, there should be savings; some very substantial. No one, of course, has any real

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<sup>26</sup> See *Owens - Ill., Inc. v. Aetna Casualty & Surety Co.*, No. 82-0089 (D.D.C. Nov. 21, 1984).

way of knowing how substantial. But remember where we presently are: for every dollar a plaintiff keeps, it cost insurers and producers \$2.71.<sup>27</sup> I will be disappointed if, through the Facility, this figure is not reduced substantially so that in the long run the Facility saves hundreds of millions, perhaps billions, of otherwise wasted dollars.

Members of the legal profession have an obligation to see that this comes to pass. I believe that members of the insurance and asbestos industries do too. Each has public obligations to reduce waste and put money in the hands of victims. I believe that the Facility responds magnificently to these obligations.

Moreover, decision-makers in these two industries as well as myself have special obligations. These obligations attach to us because we, or others whose shoes we fill, have failed in the past.

As the dean of a great law school, I am bound to accept responsibility for the training of lawyers. We have trained the best and the brightest to think about winning lawsuits. On the coverage question some of those best and brightest were lawyers for insurance companies: some argued exposure, while others argued manifestation. Both won in the sense that major insurance companies committed themselves to either a manifestation or an exposure theory. This split cost almost every company in the insurance industry millions of dollars.

Where were the insurance executives? How could they have risked the war to win a battle?

Where are they today with respect to the Asbestos Claims Facility? The fact is that while the prospects are very promising, we may not yet have the critical mass of insurers necessary to start the Facility. I believe that one reason for this is that some insurance executives are letting their lawyers tell them that they have a better way. The lawyers may be right, even as they were right on the coverage question, but only in that way.

I predict that if our private facility fails because too few insurers (or producers) subscribe, an external solution ultimately will be imposed by the courts or some other branch of government. A governmental solution could rock all the players in the asbestos litigation industry.

Mr. Michael J. Horowitz, Counsel to the Director and General Counsel of the Office of Management and Budget, who is the Chairman of the Administration's Toxic Torts/Compensation Group, and who has given his strong endorsement, along with Secretary Baldrige, to our private approach, also warned about government involvement. In a personal letter, he said it "would almost certainly lead to compensation programs that would not only be far more costly than the existing system of compensation through tort litigation, but would also require heavy if not bankrupting producer and insurer assessments." I hope this will not occur; I hope and believe that the Facility will be established. If it is, I know it will

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<sup>27</sup> RAND REPORT 38-40.



work.

Moreover, and more generally, I hope that lawyers and their clients, who are so influential in the shaping of private policy with vast public implications, can together raise their sights, can together start thinking less about victory in battle and more about long run solutions. Indeed—if you'll allow me some metaphorical latitude and promise not to tell the *New Yorker* magazine—I hope that lawyers and their clients can stop making decisions that are so heavily influenced by the knowledge that bad consequences will come home to roost on someone else's watch.

I suspect that this type of consciousness raising - a concern with long run (or, at least, middle distance) solutions rather than quick victories - may just be *the* mission for legal education in the next decade. I hope so. In my judgment, such a shift in perspective is long overdue. Even at the Yale Law School, it is time for change.